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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 454

PEDRO AGUILAR,

Petitioner,

AGAINST

STANDARD OIL COMPANY OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

GEORGE J. ENGELMAN,
Counsel for Petitioner.

JEFFREY PRESS, INC.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of the Matter Involved.

This petition seeks to review a judgment affirming a judgment of the District Court for the Southern District of New York entered on an order granting respondent's motion for a dismissal of petitioner's complaint made on a pre-trial hearing.

The action was brought by a seaman under the general maritime law on the law side of the Court for the expenses of his maintenance and cure because of personal injuries he sustained while in respondent's employ as a seaman.

The Facts.

Petitioner was employed by respondent as an Able Bodied Seaman aboard its steamship E. M. Clark. On April 18, 1938 the steamship E. M. Clark was lying in navigable waters at the plant of the Mexican Petroleum Company at Cartaret, New Jersey. On that date petitioner was given permission to go ashore and in returning from shore leave to his ship over a road which led from the gate of the plant to the ship, he was struck and injured by a motor vehicle approximately one-half a mile from his ship. Shortly prior to the occurrence, petitioner was admitted through the plant gate and onto the road on which he was injured (R. pp. 3, 4, 6, 8, 9, 10, 12).

Statement of Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the 25th day of July, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U. S. C., Title 28, Section 347).

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is to be found reported in 130 F. (2d) 154.

The District Court's opinion is set forth in the transcript of Record (R. p. 13) and is not reported.

The Question of Law.

In affirming the judgment of the District Court the Circuit Court of Appeals decided that a seaman who is injured on the means of ingress to his ship (the plant where she lies) while returning to her from shore leave is not entitled to maintenance and cure.

Petitioner respectfully contends that this rule of law pronounced by the Circuit Court of Appeals is not supported by the authorities cited except for two decisions, each by a court of original jurisdiction, which fail to analyze the problem presented.

The decision of the Circuit Court squarely reverses the classic case of *Reed* v. *Canfield* (C. C.), 20 Fed. Cas. 426 (Cas. No. 11,641) and pronounces a rule of law sharply in conflict with rules of Maintenance and Cure law pronounced by this Court in *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, 82 L. Ed. 993.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal Law which has not been, but should be settled by this Court.

2. The Circuit Court of Appeals for the Second Circuit has decided a question of law of widespread importance to seamen and to shipowners and operators, in a way probably untenable and in conflict with established judicial authority and principle.

3. The decision is squarely contrary to the decision of the Circuit Court in *Reed* v. *Canfield* (supra, p. 3); it is probably in conflict with the decision of this Court in *Calmar Steamship Corp.* v. *Taylor* (supra, p. 3) and in any event it involves the interpretation of that decision;

it also is in conflict with settled principles of law laid down by this Court and Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

PEDRO AGUILAR,

By GEORGE J. ENGELMAN,
Counsel for Petitioner.

Dated, New York, October 8, 1942.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

GEORGE J. ENGELMAN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No.

PEDRO AGUILAR,

Petitioner,

against

STANDARD OIL COMPANY OF NEW JERSEY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

POINT I.

A seaman injured on the plant at which his ship is docked while returning to the ship from shore leave, is entitled to maintenance and cure.

The seaman's right to maintenance is an ancient one. The general rule that the right to maintenance and cure arises out of a disability sustained in the "service of the ship" was enunciated in ancient maritime codes and laws. 30 Fed. Cas. 1174. The same general rule has been pronounced by our Courts. *Reed* v. *Canfield* (C. C.) 20 Fed. Cas. 426 (Cas. No. 11,641); *The A. Heaton* (C. C.) 43 Fed. 592; *The Osceola,* 189 U. S. 158, 47 L. Ed. 760. And the rule has been liberally interpreted. *Calmar Steamship Corp.* v. *Taylor* (supra, p. 3).

A. Where the Disability Is Sustained Aboard Ship.

However, the disability need not arise out of an act of labor in behalf of the ship. *Holm* v. *The Cities Service Transp. Co.* (C. C. A. 2) 60 F. (2d) 721; there the seaman was injured while off duty walking over a deck. The right to maintenance and cure for any disability sustained aboard ship during the term of employment has never been questioned except where vice, misconduct or dangerous sport, for one's own amusement, is the cause. *Meyer* v. *Dollar Steamship Line* (C. C. A. 9) 49 F. (2d) 1002.

B. Where the Disability Is Not Sustained Aboard Ship.

(1) While on Duty.

Where the disability arises out of an act of labor performed off the ship but while on duty the seaman comes under the protection of the rule. The *Montezuma* (C. C. A. 2) 19 F. (2d) 355. There the seaman was working on ship's business on the deck alongside of which the vessel lay when misfortune befell him.

(2) Where the Disability Arises Out of an Accident Occurring on the Plant Where the Seaman's Vessel Lies While He Is Returning to Her From Shore Leave.

The right of a seaman to maintenance and cure for an injury sustained while returning to his vessel from shore leave has been presented to our Courts on few occasions. The Circuit Court in its opinion below stated that petitioner was in error in supposing that the classic case of *Reed* v. *Canfield* (supra, p. 3) supported our contention; we respectfully urge that the Circuit Court misunderstood that case. There the mates improperly took shore leave,

ordered the seamen to row them from the ship and upon arriving on shore ordered them to return to the ship in a half hour; instead libelant overstayed his allotted time and when he finally attempted to row to his ship due to a change in the wind he was blown off his course and suffered injuries from the cold. While the libelant was obliged to row his officers ashore his injury was probably due as stated in *Ringgold* v. *Crocker*, 20 Fed. Cas. 813 (Cas. No. 11,843) to "over-staying the time limited them, and that misconduct probably led to the injury; as a sudden change of weather, occurring subsequent to the termination of the leave of absence, prevented the boat reaching the ship, and caused the exposure which resulted in libelant's being frozen and disabled". Once the allotted shore leave expired then libelant was no longer ashore because of the conduct and orders of the mates, he was ashore not only for his own purposes but in violation of orders; the case establishes a broader rule than necessary to support our contention. There Mr. Justice Story said:

> "Another objection is, that the maritime law applies only to sickness, and accidents, and injuries occurring in the ship's service during the voyage abroad, and not, when she is in the home part, either at the commencement or termination of her voyage. But I know of no such qualification ingrafted upon the rule of the maritime law. It embraces all sickness, and all injuries, sustained in the service of the ship, and *while the party constitutes one of her crew*, without in the slightest manner alluding to any difference between their occurring in a home or foreign port, upon the ocean, or upon tide-waters." (Italics mine.)

The only other authorities directly in point are the decisions of lower Courts which fail to probe the subject matter. *Hogan* v. *J. M. Danziger* (1938 AMC 685) sustains our position while *Lilly* v. *United States Lines Co.*,

42 F. Supp. 214, and *The President Coolidge*, 23 F. Supp. 575, are contrary.

In the light of this paucity of authority, judicial decision (1) on the question whether the use of the plant where petitioner was injured was a necessary incident of his employment and (2) whether petitioner was acting in the course of his employment at the time of the occurrence should answer the problem presented here. For if the use of the plant was a necessary incident of petitioner's employment and if petitioner while walking over it was acting in the course of his employment then most certainly petitioner was engaged "in the service of the ship".

A seaman is engaged in the course of his employment while going to or leaving his ship over the "only practicable route of immediate ingress and egress". *T. J. Moss Tie Co.* v. *Tanner* (C. C. A. 5), 44 F. (2d) 928; there a seaman employed on a barge proceeded ashore by means of a sling on another vessel lying alongside the barge and suffered injuries resulting in his death when the sling broke. The Court said:

> "As a general rule an employee is deemed to be in the course of his employment while going to or from his place of work by the only practicable route of immediate ingress and egress."

The "route of immediate ingress and egress" may cover extensive distances. *Bailey* v. *Texas Co.* (C. C. A. 2) 47 F. (2d) 153; and it has been extended to the entire yard of a railroad, the size of which was probably comparable to the plant on which appellant was injured. *Erie R. R. Co.* v. *Winfield*, 244 U. S. 170, 61 L. Ed. 1057; there a railroad employee employed on an engine finished his work, left his engine and was injured on his way home while walking over the carrier's yard. This Court said:

> "In leaving the carrier's yard at the close of his

day's work the deceased was but discharging a duty of his employment. See North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another."

The fact that respondent did not own the premises on which petitioner was injured does not take petitioner's conduct out of the course of his employment for there was no other means of ingress to the ship. In *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 68 L. Ed. 366, the employee was proceeding by automobile to his employer's plant over railroad tracks which provided the only practicable route to the plant when the automobile was struck by a train and the employee was killed. This Court held, that the conduct of the employee was such that the occurrence came within the meaning of the statutory compensable term "arising out of or in the course of his employment", sustained the award and said:

"* * * The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause."

The proximity of the premises to the place of work and the consent of the employer to their use by the employee in going to and from work, make them for purposes of

such use "in practical effect a part of the employer's premises." *Bountiful Brick Company* v. *Giles*, 276 U. S. 154, 72 L. Ed. 507; there the employee was injured outside his employer's premises while walking along railroad tracks on his way to work when injured, this Court held that the accident arose "out of and in the course of the employment" and said:

> "If the employee be injured while passing, with the expressed or implied consent of the employer, to or from his work by a way over the employer's premises or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while employee was engaged in his work at the place of its performance."

The rules pronounced by this Court in the foregoing *Parramore* and *Giles* cases involving shore servants are in accord with and are substantially the same as those laid down in *T. J. Moss Tie Co.* v. *Tanner* (supra, p. 8), *Hennessy* v. *M. & J. Tracy, Inc.* (C. C. A. 4), 295 Fed. 680, and *Wong Bar* v. *Suburban Petroleum Transport Inc.* (C. C. A. 2) 119 F. (2d) 745, which involve seamen. In the *Hennessy* case the seaman terminated his employment before quitting his ship and in leaving by means of the ship's gangway he was injured; his right to maintenance and cure was affirmed. In the *Wong Bar* case a seaman applied for work in the morning, was told he was not needed and in leaving the ship by means of its ladder he was injured: The Court said:

> "An employee continues in the course of his employment until he has left his place of employment; hence in leaving the tug both Seabrook and Wong Bar were acting in the course of their employment."

The Circuit Court below attempted to distinguish the *Hennessy* case and cases where seamen are employed on harbor vessels, sleep ashore and return to work in the morning, by stating that in such cases "it is part of the business that he shall leave the ship at night and come back in the morning." But where a seamen is employed on a voyage rather than as a day worker it is "part of the business" that while his ship is in port he will from time to time be given shore leave which is a necessary incident of his employment; his conduct in returning to his ship from shore leave appears to be more a "part of the business" of the employment than the conduct of a harbor working seaman in going to work in the morning, for the latter is not bound to a ship, whereas the former is because his contract of employment involves:

> "* * * to a certain extent, the surrender of his personal liberty during the life of the contract." Robertson v. Baldwin, 165 U. S 275, 41 L. Ed. 715.
>
> "A sailor cannot, like other workmen, divest himself of all his responsibilities to the company for which he works when his work for the day is done." Meyer v. Dollar Steamship Line (supra, p. 6).

> "These principles are that a seaman is to an extent bound to his ship in a kind of personal indenture, and the ship is in return bound to him for his wages, his maintenance and cure. That the obligations of this indenture are mutual, and continue *through the term of the employment*, and the question of how many particular voyages are made during that term, is wholly immaterial, * * *" Enochasson v. Freeport Sulphur Co. (D. C.), 7 F. (2d) 674. (Italics mine.)

> "The defendant's grant of shore leave implied a requirement that the employee should return. Masters

> of vessels have seemingly a peculiar control over the members of the crew, and even upon land." Holliday v. Merchants' & Miners' Transp. Co. (Georgia Court of Appeals), 32 Ga. App. 567, 124 S. E. 89.

That physical attachment to the ship is not a necessity in order to invoke the right to maintenance and cure is illustrated by illness cases. Where the disability arises out of an illness, the latter need not begin aboard ship or during the term of the seaman's employment and it need not be caused by the employment, it is sufficient that it result in disability during the term of the seaman's employment. *Neilson* v. *Laura* (D. C.) 17 Fed. Cas. 1305 (Cas. No. 10,092); *The Bouker No. 2* (C. C. A. 2), 241 Fed. 831.

In the *Bouker* case the seaman was employed for about two months on a harbor tug which made no more than two trips a day in good weather and about every week he would leave the tug and go home for brief periods; he declared he was too ill to work while aboard the tug, but the opinion does not indicate when or where his illness began; the Court said:

> "We may state our opinion that a seaman 'falls sick, or is wounded, in the service of the ship', if such misfortune attacks him while he is attached to the ship as part of her crew. It is not necessary that the wound or illness should be directly caused by some proven act of labor; it is enough that he was, when incapacitated, subject to the call of duty as a seaman, and earning wages as such."

In *Calmar Steamship Corp.* v. *Taylor* (supra, p. 3), the disability arose out of Buerger's disease, a condition which pre-existed the seaman's employment and which was not aggravated by it, but which resulted in disability during the employment; there this Court sustained the seaman's

right to maintenance and cure, reviewed the law on the subject at great length, and said:

> "* * * nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness.
>
> * * * It is true that in most of these cases the efficient cause of the injury or illness was some proven act of the seaman in the service of the ship, but there are others in which it was deemed enough that he was incapacitated when subject to the call of duty as a seaman, and that his incapacity continued after the voyage had ended."

We conclude from the opinion of this Court, that it is sufficient that at the time misfortune strikes, the seaman is employed as a member of the crew whereby he is contractually attached * to his ship and made "subject to the call of duty as a seaman" during the entire term of his employment. This is not to say that there can be a recovery where vice, misconduct or dangerous activity for one's own amusement is the cause and perhaps the seaman's activity ashore while enjoying shore leave before returning to his ship falls within the exception. But once the seaman has indicated that he has quit the enjoyment of shore leave by passing onto the means of ingress to his ship, then all question as to his attachment to his ship is removed and his conduct—returning to his ship so that he may serve her—becomes an act of labor on her behalf. Can our law deny the right to maintenance and cure under such circumstances, while granting it, to those who are injured while off duty and engaged in their own activities, simply because they are aboard ship, and to those who came aboard tainted with a disease which produces disability some time during the employment?

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*See authorities (supra, pp. 11-12) where the rights and obligations arising out of the seaman's contract are set forth.

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

GEORGE J. ENGELMAN,
Counsel for Petitioner.